No. 77-584

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID NEUSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his trial counsel's failure to interview potential witnesses and call them to testify denied him effective assistance of counsel.

1. Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on September 8, 1976, of conspiring to defraud insurance companies by destroying a building by arson, and of use of the mails in carrying out the fraudulent plan, in violation of 18 U.S.C. 2, 371, and 1341. On September 13, 1976, petitioner, through his privately retained trial counsel, filed a motion for a new trial and in arrest of judgment pursuant to Rules 33 and 34, Fed. R. Crim. P. After conducting an extensive hearing, the district court denied these motions.

On February 4, 1977, through new counsel,[1] petitioner filed a second motion for a new trial pursuant to Rule 33, claiming ineffective assistance of counsel at trial. The motion was accompanied by an affidavit of petitioner (Pet. App. D) principally alleging that trial counsel had failed to interview and call to testify certain potential witnesses whose names had been supplied by petitioner. The district court denied this second motion as untimely, see Rule 33, Fed. R. Crim. P., and as "lacking merit" (Pet. App. 5a).[2] The court concluded (*ibid.*) after "[a] review of the * * * record * * * that defense counsel was competent. He is a mature attorney of considerable experience in this court."

Following the denial of this second new trial motion, petitioner was fined $14,000, and was sentenced to five years' imprisonment on each of five counts, the terms to run concurrently. The court of appeals affirmed (Pet. App. A).

The evidence at trial, which included testimony of an unindicted co-conspirator directly implicating petitioner (*e.g.*, C.A. App. 416a-423a),[3] showed that petitioner conspired with several others to burn his wife's warehouse and its contents and thereafter defraud several banks and

[1]Petitioner's trial attorney, upon his own motion to withdraw, had been relieved as counsel for petitioner.

[2]We rely on the district court's disposition of petitioner's claim on the merits, rather than on the ground that his motion was untimely, since the claim would have been timely and cognizable, after sentence was imposed, as a motion under 28 U.S.C. 2255.

[3]"C.A. App." refers to the appendices filed in the court of appeals. C.A. App. 1a-926a was filed by petitioner; C.A. App. 1b-8b was filed by the United States.

insurance companies by collecting the insurance proceeds as the loss payee under the policies. A fire by arson occurred at the warehouse on March 8, 1971 (see C.A. App. 647a).[4]

2. Petitioner's claim of ineffective assistance of counsel must be measured against the requirement that his counsel's performance be within the "range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, 397 U.S. 759, 771; see *Tollett* v. *Henderson*, 411 U.S. 258, 268).[5] Judged by this standard, or by any standard articulated by the courts of appeals,[6] petitioner's counsel was competent.

The witnesses whose names had been supplied by petitioner to trial counsel were not alibi witnesses or people with first-hand knowledge of exculpatory information; petitioner's affidavit instead indicates that they were character witnesses (Pet. App. 9a). In a bench conference during the trial, petitioner's counsel indicated (C.A. App. 1b-2b) that he "had intended to call five, six or seven character witnesses" but that he was concerned that if he

[4]Petitioner thereafter sued the insurance companies for the proceeds of the policies. As petitioner states (Pet. 3), a jury found for petitioner in these suits despite the insurance companies' assertion of arson as a defense. But only one of petitioner's co-conspirators testified at that trial (C.A. App. 647a, 747a-748a) and that co-conspirator, who subsequently was granted immunity, testified at petitioner's criminal trial that he had lied at the civil trial to protect himself (C.A. App. 89a, 95a-96a). Notwithstanding the outcome of petitioner's civil suit, the evidence against petitioner in his criminal trial was very strong and amply supported the jury's verdict. Petitioner does not contend otherwise.

[5]This standard applies both to counsel's courtroom performance and to his out-of-court investigation and preparation of the case. *Moore* v. *United States*, 432 F. 2d 730, 739 (C.A. 3).

[6]There is, as petitioner suggests (Pet. 7-9), an apparent divergence of views among the circuits as to the proper standard for testing claims of incompetent counsel. Several circuits recently have rejected

did so the government on cross-examination would seek to introduce evidence that implicated petitioner in other instances of arson and discussions of arson.[7] Petitioner's counsel said (C.A. App. 2b) that "if there's the possibility that" the government would introduce such rebuttal evidence, "I will not produce character evidence * * *."

The court would venture only "a tentative opinion" in advance on the scope of rebuttal that the government could pursue (C.A. App. 5b), but stated its understanding of the law to be "that if a man calls character witnesses and places his character in evidence * * * then his character is open to attack" and that " '[o]n cross-examination, inquiry [would be] allowable into relevant specific instances of conduct' " (C.A. App. 3b, quoting from Rule 405, Fed. R. Evid.). The government prosecutor stated (C.A. App. 6b-7b) that he would indeed seek to introduce evidence of petitioner's "boast" of an earlier arson if petitioner's counsel introduced character testimony.

Under these circumstances, counsel's decision not to call character witnesses must be deemed a tactical decision

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the traditional "farce and mockery" test (*e.g., Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.); *West* v. *Louisiana*, 478 F. 2d 1026 (C.A. 5), vacated in part and remanded, 510 F. 2d 363; cf. *United States* v. *Yanishefsky*, 500 F. 2d 1327, 1333, n. 2 (C.A. 2)) and in its stead have adopted a standard of "reasonableness" that they consider to be less stringent. But even if the existing difference among the circuits otherwise constitutes a significant conflict concerning the constitutional minimum, petitioner's representation at trial was competent and constitutionally adequate under any of the standards. Cf. *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003. This case thus presents no occasion for the resolution of differences that may exist in the general standards enunciated by the courts of appeals.

[7]Petitioner's counsel so far had been successful in objecting to the introduction of this evidence (C.A. App. 287a, 459a-460a, 555a-556a).

that is well within the range of normal competency. See *United States ex rel. Walker* v. *Henderson*, 492 F. 2d 1311, 1313-1314 (C.A. 2), certiorari denied, 417 U.S. 972. The character witnesses would not have contradicted the government's strong case against petitioner, yet their use would have opened the door to the introduction of very damaging evidence concerning petitioner's past conduct and statements. Thus the record in this regard amply supports the district court's finding (Pet. App. 5a) that "defense counsel was competent."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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